IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-601

RACHEL EVANS, STEVEN R. KIDD, FERNELL PATTERSON, WALTER V. BROOKS, JR.,

Petitioners,

vs.

CARLA A. HILLS, Secretary, Department of Housing and Urban Development, JOSEPH D. MONTICCIOLO, Area Director, New York Office Department of Housing and Urban Development, S. WILLIAM GREEN, Regional Administrator, Department of Housing and Urban Development, THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, THOMAS S. KLEPPE, Secretary of the Department of the Interior, DARREL LEWIS, Director of the Bureau of Outdoor Recreation of the Department of the Interior, THE DEPARTMENT OF THE INTERIOR, and THE TOWN OF NEW CASTLE,

Respondents.

BRIEF OF RESPONDENT THE TOWN OF NEW CASTLE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent, The Town of New Castle (hereafter "Town") respectfully opposes the petition for certiorari filed by petitioners to review the judgment of the United States Court of Appeals for the Second Circuit, *en banc*, which affirmed the dismissal of the petitioners' complaint for lack of standing.

Counter-Statement of Question Presented

Did the Court of Appeals for the Second Circuit correctly apply established principles of "case and controversy" and "standing" in dismissing petitioners' complaint where petitioners' complaint failed to allege that the challenged agency actions in approving the sewer and park grants caused petitioners actual or threatened injury in fact and where the stipulated record facts confirm the absence of any injury.

Statement of the Case

The instant lawsuit represents a coercive effort to enjoin the funding of two federal grants to admittedly non-discriminatory projects having nothing to do with housing in order to induce a change in Town's existing zoning ordinance. The grant of the Department of Housing and Urban Development ("HUD") to the King-Greeley Sewer District ("King-Greeley") is for the construction of a new sewer system to replace the inadequate septic system previously in use (47a-52a).* The grant of the Bureau of Outdoor Recreation, Department of the Interior ("BOR") to Town is for the development and use of Turner Swamp as a wetlands preserve for environmental, educational and recreational use (52a-54a).

No claim is raised by petitioners that Town or King-Greeley have in the past barred, or intend in the future to bar, persons from the use of the sewer and admission to the park facilities on the basis of race, creed, religion, national origin or other unlawful basis (85a).

By written stipulation of facts, dated April 5, 1974 (84a-86a), petitioners stipulated:

(1) None of the named plaintiffs had sought housing in Town (par. 1);

* References designated "a" are to pages of the Joint Appendix filed with the court of appeals.

(2) None of the named plaintiffs or any political subdivision in which they reside applied for or was deprived of any of the federal funds granted to Town and King-Greeley (par. 2); and

(3) Plaintiffs do not claim that the sewer and park projects will be operated on a discriminatory basis, and that the benefits of the projects will be denied to persons on the basis of race, creed, color or income (pars. 3, 4).

(4) Plaintiffs do not claim that the present swamp area to be used for the proposed park at any time has been utilized for low and moderate income multi-family housing (par. 5).

The complaint does not name Town or King-Greeley as party defendants (1a-16a). Nonetheless, an injunction is demanded restraining disbursement of the federal funds "until New Castle ceases from engaging in land use practices which exclude minority and low-income people from its boundaries" as well as a declaratory judgment and other relief (14a-16a).

The relief sought is predicated on allegations directed against Town's zoning ordinance, which has been in effect since 1930 (46a).* Thus, the complaint alleges that Town engaged in "discriminatory land use practices" (3a, 4a, 6a, 9a) by reason of its existing zoning ordinance which provides for single-family residential development and prohibits multi-family housing, thereby in effect mandating "only the most expensive form of housing in New Castle" (11a). This condition, according to the complaint, means that "only the most wealthy can afford to live in New Castle," and has resulted in "a disproportionately white, disproportionately wealthy population" and in the exclusion

* The Town's zoning map was before the district court, and shows the various areas of Town zoned for residential, commercial and industrial uses (70a).

of low income black and Spanish speaking people (10a-11a).*

The complaint alleges that the federal respondents, in approving the King-Greeley sewer grant and the Town park grant, failed in their duty to promote fair housing and violated the Fifth Amendment and various federal statutes (14a-16a). In this regard, the district court specifically found:

> The relevant HUD and BOR files indicate that every effort has been made to insure compliance with the Civil Rights Acts in the administration of the funds, as dictated by federal regulations. *See, e.g.*, 24 C.F.R. § 1.4(2)(i). Thus, with respect to the BOR grant, the Town has signed an 'Assurance of Compliance' form supplied by Interior to guarantee compliance with

* Petitioners' complaint is rebutted by, among other things, the sworn affidavit of Richard E. Burns, Town Supervisor, submitted to the district court in support of Town's motion to dismiss for a lack of standing and in opposition to petitioners' motion for a preliminary injunction (44a-62a). Mr. Burns testified that King-Greeley is approximately one square mile in size and is the oldest and most settled portion of the hamlet of Chappaqua, and the majority of its residents are persons of the lower and lower-middle income ranges, including many of the Town's municipal employees as well as senior citizens. By far the greater majority of houses in King-Greeley are more than 30 years old, including some multiple dwellings constructed prior to the 1930 enactment of Town's zoning ordinance. In addition, there are four religious facilities, numerous businesses, the local public library, and two schools. King-Greeley contains more than 330 structures, and has been characterized as "densely populated" (46a). These facts have not been rebutted and must be accepted as true. Where affidavits are introduced on a Rule 12(b) motion, an opposing party may not rely on the complaint, but must disclose the facts upon which his case is based. A failure to do so ends his entitlement to have the pleadings liberally construed in his favor. *E.g., Cook* v. *Hirschberg*, 258 F.2d 56, 57-58 (2d Cir. 1958); *accord, Norton* v. *McShane*, 332 F.2d 855, 861 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1968); *International Longshoremen's & Warehousemen's U.* v. *Kuntz*, 334 F.2d 165 (9th Cir. 1964); 6 Moore's *Federal Practice*, ¶ 56.22 [2] at 56-1337 (2d ed. 1976).

> Title VI of the Civil Rights Act of 1964; furthermore, the General Provisions of the 'Land and Water Conservation Fund Project Agreement' declares that 'The [grantee] shall not discriminate against any person on the basis of race, color, or national origin in the use of any property or facility acquired or developed pursuant to this agreement', as well as a further assurance of compliance with Title VI and the regulations promulgated thereunder. The HUD agreement incorporates a similar 'assurance of Compliance' form both as a separate document and as part of the grant agreement. And HUD's 'Project Summary and Approval' form specifically concluded that, after examination, '[t]he proposed facilities will serve the applicant's area of jurisdiction without discrimination against any minority group. (A97-98, n.6).*

This finding of fact was not disturbed on appeal.**

The district court in a well reasoned opinion dismissed the complaint for lack of jurisdiction, holding that petitioners lacked standing under the principles enunciated in a series of decisions of this Court. The district court correctly observed, among other things, that plaintiffs could

* References designated "A" are to petitioners' Appendix to Petition for Writ of Certiorari filed with this Court.

** Petitioners' argument that Town's application should have received no more than 30 points rather than the 41 points shown on the HUD original rating sheet (Petition, p. 6), is factually incorrect. The principal difference between the *de novo* rating and the original rating resulted from incorrect data used in the *de novo* rating. Financial need in the *de novo* rating was based on the median family income for Town taken from the 1970 census (175a). Such data has no relevancy to King-Greeley which was the applicant for the HUD grant as it is undisputed that the median income for King-Greeley is considerably lower than that of the Town as a whole (51a). Petitioners' argument rests on a deposition conducted by them prior to Town's intervention. Such testimony is inherently unreliable since it has not been tested in the crucible of cross-examination. The admissibility and credibility of such testimony was not determined by the district court and is not properly includable in an appellate record.

not challenge Town's zoning since "none of the plaintiffs claimed that anyone refused to sell or lease housing to them; . . . [and] plaintiffs neither had nor claimed any interest in land within the town or any connection with any plan to construct housing for them within the town" (A96-97). The court of appeals affirmed.

Reasons Why the Writ *Should be Denied*

1. The opinion of the court of appeals clearly demonstrates that its conclusion that petitioners lack standing to sue and fail to satisfy the Article III requirement of "case or controversy" is based on a straightforward reading of *Warth* v. *Seldin,* 422 U.S. 490 (1975). Rather, that court's judgment of dismissal is firmly grounded on a long line of "standing" decisions of this Court which require that a plaintiff satisfy the "case or controversy" prerequisite by demonstrating actual or threatened injury in fact. *E.g., Simon* v. *Eastern Ky. Welfare Rights Org.,* 44 U.S.L.W. 4724 (1976); *Warth* v. *Seldin, supra*; *United States* v. *Richardson,* 418 U.S. 166, 175 (1974); *Schlesinger* v. *Reservists to Stop the War,* 418 U.S. 208, 220 (1974); *O'Shea* v. *Littleton,* 414 U.S. 488, 494 (1974); *California Bankers Assoc.* v. *Schultz,* 416 U.S. 21, 68-69 (1974); *Linda R. S.* v. *Richard D.,* 410 U.S. 614, 617-18 (1973); *Sierra Club* v. *Morton,* 405 U.S. 727, 735 (1972); *Laird* v. *Tatum,* 408 U.S. 1, 13-14 (1972); *Association of Data Processing Serv. Organizations, Inc.* v. *Camp,* 397 U.S. 150 (1970); *Flast* v. *Cohen,* 392 U.S. 83, 103 (1968).

This Court has recognized, in addition to the constitutional mandate of standing, other prudential limitations on the rights of persons to invoke a federal court's decisional and remedial powers. Standing involves a two-pronged test: a plaintiff must seek the protection of an interest "arguably within the zone of interests" of the statutory provision he claims has been violated *and* he must suffer injury in fact from the challenged action. *Association of Data*

Proceessing v. *Camp, supra,* 397 U.S. at 152-53; *Barlow* v. *Collins,* 397 U.S. 159 (1970). A "generalized grievance" shared in substantially equal measure by all or a large number of citizens does not meet this test; a plaintiff must allege an injury to himself even though it may be shared by numerous others. *Warth* v. *Seldin, supra,* 422 U.S. at 501; *Schlesinger* v. *Reservists to Stop the War, supra,* 418 U.S. at 225; *United States* v. *Richardson, supra,* 418 U.S. at 180; *accord, Ex parte Levitt,* 302 U.S. 633 (1937). Thus, a plaintiff generally must assert his own legal rights and interests and not those of third parties. *Compare Singleton* v. *Wulff,* 49 L. Ed. 2d 826, 833 (1976) *and Barrows* v. *Jackson,* 346 U.S. 249, 255 (1953) *with Laird* v. *Tatum,* 408 U.S. 1, 13 n.7 (1972); *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 166 (1972); *United States* v. *Raines,* 362 U.S. 17, 21 (1960); *Tileston* v. *Ullman,* 318 U.S. 44 (1943).

Injury in fact must be personal to the plaintiff and be real and immediate. While the injury need not necessarily be economic, *Sierra Club* v. *Morton, supra,* it must be concrete—"Abstract injury is not enough". *O'Shea* v. *Littleton,* 414 U.S. 488, 494 (1974).

At bar, the court of appeals and the district court concluded that petitioners had failed to demonstrate this requisite injury in fact, and thus had failed to present a "case or controversy". Under such circumstances, it was unnecessary for the court below to consider the additional prudential limitations of standing.* Petitioners misconstrue the thrust of the decision below and argue, in effect, that *Warth* was improperly extended to the case at bar, since the instant action is predicated on a federal statute, a factor not present in *Warth.* Admittedly, Congress may by

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* Thus, the court of appeals did not deem it necessary to reach the question as to whether under the facts at bar the enforcement provisions of the Fair Housing Act provide a private right of action to obtain judicial review of HUD's alleged maladministration of the Act. *See* separate concurring opinion of Judge Mansfield (A23).

statute confer a right of action on persons where none would exist absent such statute. But the existence of such statute does not *ipso facto* abrogate the constitutional requirement of "injury in fact". As. Mr. Justice Powell stated in *Warth* v. *Seldin:*

> [C]ongress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. 422 U.S. at 501 (citations omitted).

Contrary to the suggestion of petitioners, section 10 of the Administrative Procedure Act, 5 U.S.C. 702, does not compel the conclusion that petitioners have standing absent injury in fact. Section 702 expressly embodies the requirement that a plaintiff proceeding thereunder be "adversely affected or aggrieved" by the challenged administrative action. This Court has interpreted standing under the Administrative Procedure Act to require compliance with the accepted two-prong standing test. *Sierra Club* v. *Morton, supra,* 405 U.S. at 733; *United States* v. *SCRAP,* 412 U.S. 669 (1973); *Association of Data Processing* v. *Camp, supra; Barlow* v. *Collins, supra.*

Nor does anything in Title VIII of the Fair Housing Act, upon which petitioners base their claim, support the notion that injury in fact is dispensed with when an action is brought to enforce an alleged duty under that statute. Under Title VIII, a right of action is granted to a "person aggrieved", a term defined in the statute as "[a]ny person who claims to have been injured by a discriminatory housing practice . . . ." 42 U.S.C. 3610(a). Title VIII thus expressly retains the conventional requirement that a plaintiff cannot bring a suit unless he has sustained a real and immediate injury as a result of the challenged action.

The court of appeals below was mindful that a federal court cannot ignore the requirement of Article III. In *Simon* v. *Eastern Ky. Welfare Rights Org.,* 48 L. Ed. 2d 450, 461 (1976), Mr. Justice Powell stated:

> The necessity that the plaintiff who seeks to invoke judicial powers stand to profit in some personal interest remains an Article III requirement. A federal court cannot ignore this requirement without overstepping its assigned role in our system of adjudicating only actual cases and controveries. (Footnote omitted).

That petitioners do not "stand to profit in some personal interest" is exemplified by the lower court's finding that the relief demanded by the complaint is not likely to improve their housing status (A15). Further, petitioners have stipulated that the subject federal funds would not otherwise have gone to the communities in which they presently reside (85a). To quote Judge Moore, "The link between the ill allegedly suffered and the remedy requested is so tenuous as to approach the non-existent" (A16).

The dissenting opinions below do not meet this issue of lack of injury in fact. The "injury" perceived by Judge Oakes stemming from plaintiffs' residence in a racially segregated housing environment cannot under the record facts at bar be attributed to the funding of the sewer and park projects.

There is no claim that use of the sewer will be improperly restricted. *Compare United Farm. of Fla. H. Proj., Inc.* v. *City of Delray Beach,* 493 F.2d 799 (5th Cir. 1974). Nor do the complaint and record facts support Judge Oakes' assertion that challenged projects perpetuate segregated housing because they are "inconsistent with construction of high-density, low-cost housing in New Castle . . . " (see A36). Indeed, the King-Greeley area of Town is already "densely populated" with much of the construction

antedating the 1930 zoning ordinance, and the sewer facility is sufficient in size to handle existing King-Greeley buildings as well as any new construction, including multi-family residential units and substantial business development (49a). Similarly, the speculation that the Turner Swamp wetlands preservation project might be different if it was developed to serve families in multi-family residences finds no support either in the allegations of the complaint or in the sworn affidavits and depositions which form the record herein.

Petitioners' characterization of Town's zoning as "restrictive" and "exclusionary" because it restricts certain areas to one-family dwellings (58a-62a) adds nothing to the substance of their complaint. The Town's zoning ordinance is neither unconstitutional nor discriminatory, and is within the reasonable exercise of the community's police power. *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974); *Ybarra* v. *City of Town of Los Altos Hills,* 503 F.2d 250 (9th Cir. 1974); *Construction Ind. Ass'n, Sonoma Co.* v. *City of Petaluma,* 522 F.2d 897 (9th Cir. 1975), *cert. denied,* 96 S. Ct. 1148 (1976).

In sum, the decision and judgment of the court of appeals affirming dismissal of petitioners' complaint for lack of standing faithfully reflects the prior rulings of this Court and is consistent with this Court's recent decisions in *Simon* v. *Eastern, supra* and *Singleton* v. *Wulff, supra.*

2. The decision of the court of appeals below is in harmony with the case law of other circuits. A reading of the recent "standing" decisions of the lower federal courts subsequent to *Warth* discloses that there are no conflicting interpretations of *Warth.* Rather, the lower federal courts have continued to apply consistently the standing tests articulated by this Court in *Association of Data Processing* v. *Camp, supra. See, e.g., Gray* v. *Greyhound Lines East,* 45 U.S.L.W. 2207 (D.C. Cir. October 13, 1976); *Malamud*

v. *Sinclair Oil Corp.,* 521 F.2d 1142 (6th Cir. 1975); *Paton* v. *La Prade,* 524 F.2d 862 (3d Cir. 1975); *Nat. U. of Hospital & Health Care Emp.* v. *Carey,* 409 F. Supp. 1197 (S.D.N.Y. 1976); *Scodari* v. *Alexander,* 69 F.R.D. 652 (E.D.N.Y. 1976).

3. The judgment of the court of appeals rests in substantial part on the parties' written stipulation of facts which in itself negates the existence of any injury in fact. As such the instant action is not an appropriate vehicle for this Court's review should this Court desire to refine further its prior decisions on standing.

4. The instant decision will have little effect on other litigants and may well be moot as between the parties. As acknowledged by petitioners, the sewer grant program in question, a HUD categorical grant, has been superseded by the block grant community development program under the Housing and Community Development Act of 1974, 42 U.S.C. 5301 *et seq.* (Petition, p. 5n.). Accordingly, whatever change in procedure petitioners seek to impose upon the governmental respondents with respect to the HUD categorical grant at bar will have little, if any, bearing on future block grant applications.

In addition, Town has previously suggested this action may be moot. *DeFunis* v. *Odegaard,* 416 U.S. 312, 318 (1974). (Town Brief on rehearing *en banc,* p. 49n.). The wetlands project has been completed and the BOR grant has been paid in full. The sewer project has been completed, and is in use. The HUD grant has been paid, except for a small balance being withheld awaiting final audit of costs.

CONCLUSION

For the foregoing reasons, respondent Town respectfully urges this Court to deny petitioners' writ of certiorari.

Respectfully submitted,

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